140-220

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 327.

THE BANK OF UNIONTOWN, PLAINTIFF IN ERROR,

vs.

DAVID J. MACKEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED FEBRUARY 11, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 9, 1890.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the seventh judicial circuit and district of Indiana, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court, before you, between The Bank of Uniontown and The Mount Vernon Mill and Elevator Company and David J. Mackey, a manifest error hath happened, to the great damage of the said Bank of Uniontown, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and pro-

2 ceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court.

Done at Evansville this 30th day of January, A. D. 1888.

[Seal of the United States Circuit Court, Dist. of Ind.]

N. C. BUTLER, *Clerk.*

3 Circuit Court of the United States, District of Indiana.

BANK OF UNIONTOWN
vs.
MOUNT VERNON MILL & ELEVATOR COMPANY, DAVID J. MACKEY.

Know all men by these presents that we, The Bank of Uniontown, of Uniontown, Kentucky, and Ben. Weil, of the city of Evansville, State of Indiana, are held and firmly bound unto David J. Mackey in the sum of five hundred dollars, — to the said David J. Mackey, his executors and administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and *we* and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 3d day of November, 1887.

Whereas the above-named Bank of Uniontown hath prose-

4 cuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of Indiana, at Evansville:

Now, therefore, the condition of this obligation is such that if the above-named Bank of Uniontown shall prosecute its said writ

of error to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) SYLVESTER PIKE, *Pres't.* [SEAL.]
BEN. WEIL. [SEAL.]

Approved Nov. 5, 1887.

N. C. BUTLER, *Clerk.*

5 DISTRICT OF INDIANA, }
At Evansville. }

A true copy.
Attest:
[Seal of the United States Circuit Court, Dist. of Ind.]

N. C. BUTLER, *Clerk.*

6 United States of America to David J. Mackey, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Indiana (at Evansville), wherein Bank of Uniontown is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

Witness the Honorable William A. Woods, one of the judges
7 of said circuit court, this 9th day of November, A. D. 1887.

WILLIAM A. WOODS.

I acknowledge service of the foregoing citation this 8th day of December, 1887.

G. V. MENZIES,
Attorney for Defendant in Error.

8 Pleas of the circuit court of the United States for the district of Indiana (at Evansville), begun and holden at the United States court-room, in the city of Evansville, in said district, on the first Monday in the month of October, in the year of our Lord one thousand eight hundred and eighty-seven, before the Honorable William A. Woods, judge of the district court of the United States for the district of Indiana and *ex officio* one of the judges of said circuit court.

THE BANK OF UNIONTOWN
v.
MOUNT VERNON MILL AND ELEVATOR COMPANY, DAVID J. MACKEY. } No. 378.

Complaint.

Be it remembered that heretofore, to wit, on the 14th day
9 of September, A. D. 1886, there was filed in the office of —

clerk of said court a complaint in the words and figures following, to wit:

Circuit Court of the U. S. for the District of Indiana.

THE BANK OF UNIONTOWN
v.
MOUNT VERNON MILL AND ELEVATOR COMPANY, DAVID J. MACKEY.

The Bank of Uniontown, citizens of the State of Kentucky, incorporated by the name aforesaid by the said State and having their principal place of business therein, plaintiffs, complain of the Mount Vernon Mill and Elevator Company, citizens of the State of Indiana, incorporated by the name aforesaid by the said State and having their principal place of business therein, and David J. Mackey,
10 a citizen and resident of the said State of Indiana, defendant-, and for complaint say that at and before the times hereinafter mentioned, under and by virtue of an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to incorporate the Bank of Uniontown," approved April 11, 1882, it was and now is an incorporated bank and doing business as such at the town of Uniontown, in Union county, Kentucky, and by its said act of incorporation was authorized and empowered, among other things, to "deal in the loaning of money to buy and sell bills of exchange, promissory notes, and other evidence of debt."

That the defendant, The Mount Vernon Mill & Elevator Company, a corporation organized and doing business under the laws of the State of Indiana and in Posey county, in said State,
11 and one George Naas, by their promissory note, dated July 20th, 1885, promised to pay to the order of the defendant David J. Mackey, as "D. J. Mackey," four month- after the date thereof, negotiable & payable at the bank of this plaintiff, at Uniontown, Kentucky, the sum of five thousand dollars, with interest at the rate of eight per cent. per annum after maturity.

On the part of said Mount Vernon Mill & Elevator Company said note was signed by W. C. Fuhrer, its president, and was countersigned by W. L. Boyce, its secretary & treasurer, and sealed with its corporate seal, and is in the words and figures following, viz:

$5,000.00. UNIONTOWN, KY., *July* 20, 1885.

Four months after date we promise to pay to the order of D. J. Mackey five thousand dollars, at the Bank of Uniontown, at
12 Uniontown, Ky., value received, with interest at the rate of eight per cent. per annum after maturity until paid. If collected by suit, we agree to pay a reasonable attorney fee.

[Seal Mount Vernon Mill & Elevator Compnny, Mt. Vernon.]

W. C. FUHRER, *P't.*
GEORGE NAAS.

W. L. BOYCE,
Sec'y & Treas.

On the — day of July, 1885, the said note was by said Mackey endorsed in blank for the accom-odation of the defendant The Mount Vernon Mill and Elevator Company, who was the principal in said note, the said Naas being only a surety therein, the purpose and intent of such indorsement being that the said mill and elevator company should procure the said note to be discounted at this plaintiff's said bank, and the said note was, on the — day of July, 1885, discounted by this plaintiff, who then and there paid therefore to the said mill and elevator company the sum of five
13 thousand eight hundred and sixty-five dollars, being the face value thereof, less the sum of 135.00 dollars, being the discount thereon agreed upon by the plaintiff and said defendant in lieu of interest upon the sum so paid therefor; by reason of all which the plaintiff became and now is the holder and owner of the *void* note.

Afterwards, and before the maturity of the said note, to wit, on the 20th day of November, 1885, the defendant Mackey, by an instrument of writing made and signed by him and by him delivered to this plaintiff, waived presentment for payment, protest, and notice of protest of said note, and consented that the time for the payment thereof might be extended until he should give written notice to the contrary. The said instrument of writing is in the words and figures following, viz:

14 This memorandum witnesseth that in the matter of a certain promissory note for (5,000) five thousand dollars, dated July 20th, 1885, and due November 20–23, 1885, wherein the Mount Vernon Mill & Elevator Company and George Naas are makers and D. J. Mackey is endorser, the undersigned hereby waives presentment for payment, protest, notice of protest, and consents that the payment thereof may be extended until he gives written notice to the contrary.

Dated at Evansville, Indiana, this 20th day of November, 1885.

D. J. MACKEY.

And the plaintiff says that the note herein sued on is the note intended in the said instrument of writing. At the time of the making and delivery of the said instrument of writing the said George Naas, surety in the said note, was ill of his last sickness, and
15 by reason thereof unable to transact or consider any matter of business, as the defendant Mackey well knew, and the defendant The Mount Vernon Mill & Elevator Company desiring to renew said note or to have further time on same should not said Naas in a reasonable time sufficiently recover to unite in the renewal thereof, procured the defendant Mackey to execute the said writing so that such extension of time might be obtained, and after the making and delivery to it of the said instrument of writing and after the maturity of the said note, to wit, on the 29 day of December, 1885, the said Naas not having recovered sufficiently to transact any business or to renew said note or consent to an extension of the time for payment thereof, the interest on said note for

four months was paid by the said Mill & Elevator Company,
16 and the time for the payment thereof was extended until the 26th day of March, 1886, being four months from the maturity thereof.

The said George Naas has departed this life. Plaintiff says that the General Statutes of the Commonwealth of Kentucky, being the statute law of said State in force now and from a time before the making of the said note, contains the following provision, viz:

"Promissory notes payable to any person or persons or to a corporation and payable and negotiable at any bank incorporated under any law of this Commonwealth or organized in this Commonwealth under any law of the United States, which shall be indorsed to and discounted by the bank at which the same is payable or by any other of the banks in this Commonwealth, as above specified,
17 shall be, and they are hereby, placed on the same footing as foreign bills of exchange."

And plaintiff says that by force of the said statute the said note is placed on the footing of a foreign bill of exchange, and plaintiff is entitled to have its actions thereon against the makers and the endorsers thereon.

No part of the said note has been paid but the interest thereon, as above stated, though the same has long since been due.

Wherefore plaintiff prays judgment for the sum of six thousand dollars, for its costs, and for all proper relief.

Par. 2. The Bank of Uniontown, citizens of the State of Kentucky, incorporated by the name aforesaid by the said State and having their principal place of business therein, plaintiffs, complain
18 of the Mount Vernon Mill and Elevator Company, citizens of the State of Indiana, incorporated by the name aforesaid by the said State and having their principal place of business therein, and David J. Mackey, a citizen and resident of the said State of Indiana, defendants, and for complaint say that at and before the times hereinafter mentioned, under and by virtue of an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to incorporate the Bank of Uniontown," approved April 11, 1882, it was and now is an incorporated bank and doing business as such at the town of Uniontown, in Union county, Kentucky, and by its said act of incorporation was authorized and empowered, among other things, to "deal in the loaning of money, to buy and sell bills of exchange, promissory notes, and other evidences of debt;" that
19 the defendant The Mount Vernon Mill & Elevator Company, a corporation organized and doing business under the laws of the State of Indiana, and in Posey county, in said State, and one George Naas, by their promissory note, dated July 20th, 1885, promised to pay to the order of the defendant David J. Mackey, as "D. J. Mackey," four months after the date thereof, negotiable and payable at the bank of this plaintiff at Uniontown, Kentucky, the sum of five thousand dollars, with interest at the rate of eight per cent. per annum after maturity. On the part of said Mount Vernon Mill & Elevator Company said note was signed by W. C. Fuhrer, its president, and was countersigned by W. L. Boyce, its secretary and treas-

urer, and sealed with its corporate seal, and is in the words and figures following, viz:

$5.000.00. UNIONTOWN, KY., *July* 20, 1885.

Four months after date we promise to pay to the order of
20 D. J. Mackey five thousand dollars, negotiable and payable at the Bank of Uniontown, at Uniontown, Ky., value received, with interest at the rate of eight per cent. per annum after maturity until paid. If collected by suit, we agree to pay a reasonable attorney's fee.

[Seal Mount Vernon — & Elevator Company, Mt. Vernon.]

W. C. FUHRER, *P't.*
GEORGE NAAS.

W. L. BOYCE,
Scc'y & Treas.

On the — day of July, 1885, the said note was by said Mackey endorsed in blank for the accom-odation of the defendant The Mount Vernon Mill & Elevator Company, who were the principal in said note, the said Naas being only a surety therein, the purpose and intent of such endorsement being that the said mill & elevator company should procure the said note to be discounted at this plaintiff's said bank, and the said note was on the — day of July, 1885, discounted by this plaintiff, who then and there paid there-
21 for to the said bank and elevator company the sum of $4,865 *dollars*, being the face value thereof, less the sum of $135 *dollars*, being the discount thereon agreed upon by the plaintiff and said defendant in lieu of interest upon the sum so paid therefor, by reason of all which the plaintiff became and now is the holder and owner of the said note.

A short time before the maturity of the said note, to wit, on the 20th day of November, 1885, the said George Naas, surety in the said note, being ill of what proved to be his last sickness, and by reason thereof being unable to transact or consider any matters of business, as was well known to defendant the Mount Vernon Mill and Elevator Company desiring to renew said note for the purpose of obtaining forbearance and indulgence thereon until such time as the said Naas should sufficiently recover to unite in such re-
22 newal, procure- the defendant David J. Mackey to make and sign, and by his direction delivered to this plaintiff, an instrument of writing, whereby said Mackey waived presentment for payment, protest, and notice of protest of said note and consented that the payment thereof might be extended until he should give written notice to the contrary. The said instrument of writing is in the words and figures following, viz:

"This memorandum witnesseth that in the matter of a certain promissory note for ($5,000) five thousand dollars, dated July 20th, 1885, and due November 20–23, 1885, wherein the Mount Vernon Mill & Elevator Company and George Naas are makers and D. J. Mackey is endorser, the undersigned hereby waives presentment for

payment, protest, notice of protest and consents that the payment thereof may be extended until he gives written notice to the contrary.

23 Dated at Evansville, Indiana, this 20th day of November, 1885.

D. J. MACKEY."

And the plaintiff says that the note herein sued on is the note intended in the said instrument of writing, and, in consideration of the agreements therein contained, this plaintiff did not cause the said note to be protested for non-payment and consented that it might be renewed and forebore to sue thereon until after the decease of the said Naas.

The said George Naas has departed this life. Plaintiff says that the General Statutes of the Commonwealth of Kentucky, being the statute law of said State in force now and from a time before the making of the said note, contains the following provision, viz:

"Promissory notes payable to any person or persons or to a corporation and payable & negotiable at any bank incorporated

24 under any law of this Commonwealth or organized in this Commonwealth under any law of the United States, which shall be indorsed to and discounted by the bank at which the same is payable or by any other of the banks in this Commonwealth, as above specified, shall be, and they are hereby, placed on the same footing as foreign bills of exchange."

And plaintiff says that by force of the said statute the said note is placed on the footing of a foreign bill of exchange, and plaintiff is entitled to have its action thereon against the makers and the endorsers thereon. No part of the said note has been paid but the sum of 136.65 dollars, paid the 29th day of December, 1885, though the same has long since been due.

Wherefore the plaintiff prays judgment for the sum of six thousand dollars, for its costs, and for all proper relief.

25 Par. 3. The Bank of Uniontown, citizens of the State of Kentucky, incorporated by the name aforesaid by the said State and having their principal place of business therein, plaintiffs, complain of the Mount Vernon Mill & Elevator Company, citizens of the State of Indiana, incorporated by the said name aforesaid by the said State and having their principal place of business therein, and David J. Mackey, a citizen and resident of the said State of Indiana, defendants, and for complaint say that at and before the time hereinafter mentioned, under and by virtue of an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to incorporate the Bank of Uniontown," approved April 11, 1882, it was and now is an incorporated bank and doing business as such at the town of Uniontown, in Union county,

26 Kentucky, and by its said act of incorporation was authorized and empowered, among other things, to "deal in the loaning of money, to buy and sell bills of exchange, promissory notes, and other evidences of debt.

That the defendant The Mount Vernon Mill & Elevator Com-

pany, an incorporation organized and doing business under the laws of the State of Indiana and in Posey county, in said State, and one George Nass, by their promissory note dated July 29, 1885, promised to pay to the order of the defendant David J. Mackey, as D. J. Mackey, four months after the date thereof, negotiable & payable at the bank of this plaintiff, at Uniontown, Kentucky, the sum of five thousand dollars, with interest at the rate of eight per cent. per annum after maturity. On the part of said Mount Vernon Mill & Elevator Company said note was signed by W. C. Fuhrer, its
27 president, and was countersigned by W. L. Boyce, its secretary & treasurer, and sealed with its corporate seal, and is in the words and figures following, viz :

$5,000.00. UNIONTOWN, KY., *July* 29, 1885.

Four months after date we promise to pay to the order of D. J. Mackey five thousand dollars, negotiable & payable at the Bank of Uniontown, at Uniontown, Ky., value received, with interest at the rate of eight per cent. per annum after maturity until paid. If collected by suit, we agree to pay a reasonable attorney's fee.

[Seal Mount Vernon Mill & Elevator Co., Mt. Vernon.]

W. C. FUHRER, *P't.*
GEORGE NAAS.

W. C. BOYCE,
Sec'y & Treas.

On the — day of July, 1885, the said note was by said Mackey endorsed in blank for the accom-odation of the defendant The Mount Vernon Mill & Elevator Company, who was the principal in said note, the said Naas being only a surety therein, the pur-
28 pose and intent of such endorsement being that the said Mills & Elevator Company should procure the said note to be discounted at this plaintiff's said bank, and the said note was, on the — day of July, 1885, discounted by this plaintiff, who then and there paid therefor to the said Mill & Elevator Company the sum of $4,865 *dollars*, being the face value thereof, less the sum of $135 *dollars*, being the discount thereon agreed upon by the plaintiff and said defendant in lieu of interest upon the sum so paid therefor; by reason of all which the plaintiff became and now is the holder and owner of the said note.

Afterwards, and before the maturity of the said note, to wit, on the 20th day of November, 1885, the defendant Mackey, by an instrument of writing made and signed by him and by him deliv-
29 ered to this plaintiff, waived presentment for payment, protest, and notice of protest of said note, and consented that the time for the payment thereof might be extended until he should give written notice to the contrary.

The said instrument of writing is in the words and figures following, viz:

"This memorandum witnesseth that in the matter of a certain promissory note for ($5,000) five thousand dollars, date- July 29th,

1885, and due November 29, December 1st, 1885, wherein the Mount Vernon Mill & Elevator Company and George Naas are makers and D. J. Mackey is endorser, the undersigned hereby waives presentment for payment, protest, notice of protest, and consents that the payment thereof may be extended until he gives written notice to the contrary.

Dated at Evansville, Indiana, this 20th day of November, 1885.

D. J. MACKEY."

30 And the plaintiff says that the note therein sued on is the note intended in the said instrument of writing.

At the time of the making and delivery of the said instrument of writing the said George Naas, surety in the said note, was ill of his last sickness, and by reason thereof unable to transact or consider any matter of business, as the defendant Mackey well knew, and the defendant The Mount Vernon Mill & Elevator Company, desiring to renew said note or to have further time on same should not said Naas in a reasonable time sufficiently recover to unite in the renewal thereof, procured the defendant Mackey to execute the said writing so that such extension of time might be obtained, and after the making and delivery to it of the said instrument of writing and after the maturity of the said note, to wit, on the 29th day of December, 1885, the said Naas not having recovered sufficiently to trans-

31 act any business, the interest on said note for four months was paid by the said mill & elevator company, and the time for the payment thereof was extended until the 1–4 day of April, 1886, being four months from the maturity thereof.

The said George Naas has departed this life. Plaintiff says that the "General Statutes" of the Commonwealth of Kentucky, being the statute law of said State in force now and from a time before the making of the said note, contains the following provision, viz:

"Promissory notes payable to any person or persons or to a corporation and payable and negotiable at any bank incorporated under any law of this Commonwealth or organized in this Commonwealth under any law of the United States, which shall be endorsed to and discounted by the bank at which the same is payable or by any other of the banks of this Commonwealth, as above specified,

32 shall be, and they are hereby, placed on the same footing as foreign bills of exchange."

And plaintiff says that by force of the said statute the said note is placed on the footing of a foreign bill of exchange, and plaintiff is entitled to have its action thereon against the makers and the endorsers thereof.

No part of the said note has been paid but the interest thereon, as above stated, though the same has long since been due. Wherefore plaintiff prays judgment for the sum of six thousand dollars, for its costs, and for all proper relief.

Par. 4. The Bank of Uniontown, citizens of the State of Kentucky, incorporated by the name aforesaid by the said State and having their principal place of business therein, plaintiffs, complain of the Mount Vernon Mill & Elevator Company, citizens of the

State of Indiana, incorporated by the name aforesaid by the
33 said State and having their principal place of business therein, and David J. Mackey, a citizen and resident of the said State of Indiana, defendants, and for complaint say that at and before the times hereinafter mentioned, under and by virtue of an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to incorporate the Bank of Uniontown," approved April 11, 1882, it was and now is an incorporated bank and doing business as such at the town of Uniontown, in Union county, Kentucky, and by its said act of incorporation was authorized and empowered, among other things, to "deal in the loaning of money, to buy and sell bills of exchange, promissory notes, and other evidences of debt."

That the defendant The Mount Vernon Mill & Elevator Com-
pany, a corporation organized and doing business under the
34 laws of the State of Indiana and in Posey county, in said State, and one George Naas, by their promissory note, dated July 29, 1885, promised to pay to the order of the defendant David J. Mackey, as "D. J. Mackey," four months after the date thereof, negotiable & payable at the bank of this plaintiff, at Uniontown, Kentucky, the sum of five thousand dollars, with interest at the rate of eight per cent. per annum after maturity.

On the part of said Mount Vernon Mill & Elevator Company said note was signed by W. C. Fuhrer, its president, and was countersigned by W. L. Boyce, its secretary & treasurer, and sealed with its corporate seal, and is in the words and figures following, viz:

$5,000.00. UNIONTOWN, KY., *July* 29, 1885.

Four months after date we promise to pay to the order of D. J. Mackey five thousand dollars, negotiable and payable at the Bank of Uniontown, at Uniontown, Ky., value received, with in-
35 terest at the rate of eight per cent. per annum after maturity until paid. If collected by suit, we agree to pay a reasonable attorney's fee.

[Seal Mount Vernon Mill & Elevator Company, Mt. Vernon.]

W. C. FUHRER, *P't.*
GEORGE NAAS.

W. L. BOYCE,
Sec'y & Treas.

On the — day of July, 1885, the said note was by said Mackey endorsed in blank for the accom-odation of the defendant The Mount Vernon Mill & Elevator Company, who was the principal in said note, the said Naas being only a surety therein, the purpose and intent of such endorsement being that the said mill and elevator company should procure the said note to be discounted at this plaintiff's said bank, and the said note was, on the — day of July, 1885, discounted by this plaintiff, who then and there paid therefor to the said mill & elevator company the sum of $4,865.00 *dollars*, being the face value thereof, less the sum of $135 *dollars*,
36 being the discount thereon; by reason of all which the plaintiff became and now is the holder and owner of the said note.

A short time before the maturity of the said note, to wit, on the 20th day of November, 1885, the said George Naas, surety in the said note, being ill of what proved to be his last sickness, and by reason thereof being unable to transact or consider any matter of business, as was well known to defendant Mackey, and the defendant The Mount Vernon Mill & Elevator Company, desiring to renew said note for the purpose of obtaining forbearance and indulgence thereon until such time as the said Naas should sufficiently recover to unite in such renewal, procured the defendant David J. Mackey to make and sign and by his direction delivered to this plaintiff an instrument of writing, whereby said Mackey waived presentment for payment, protest, and notice of protest of said note, and
37 consented that the payment thereof might be extended until he should give written notice to the contrary. The said instrument of writing is in the words and figures following, viz:

"This memorandum witnesseth that in the matter of a certain promissory note for ($5,000) five thousand dollars, dated July 29, 1885, and due November 29, December 1st, 1885, wherein the Mount Vernon Mill & Elevator Company and George Naas are makers and D. J. Mackey is endorser, the undersigned hereby waives presentment for payment, protest, notice of protest, and consents that the payment thereof may be extended until he gives written notice to the contrary.

Dated at Evansville, Indiana, this 20th day of November, 1885.

D. J. MACKEY.

And the plaintiff says that the note herein sued on is the
38 note intended in the said instrument of writing; and in consideration of the agreements herein contained this plaintiff did not cause the said note to be protested for non-payment, and consented that it might be renewed, and forbore to sue thereon until after the decease of the said Naas.

The said George Naas has departed this life. Plaintiff says that the General Statutes of the Commonwealth of Kentucky, being the statute law of said State in force now and from a time before the making of the said note, contains the following provisions, viz:

"Promissory notes payable to any person or persons or to any corporation and payable and negotiable at any bank incorporated under any law of this Commonwealth or organized in this Commonwealth under any law of the United States, which shall be indorsed to and discounted by the bank at which the same is
39 payable or by any other of the banks in this Commonwealth, as above specified, shall be, and they are hereby, placed on the same footing as foreign bills of exchange."

And plaintiff says that by force of the said statute the said note is placed on footing of a foreign bill of exchange and plaintiff is entitled to have its action thereon against the makers and the endorsers thereon.

No part of the said note has been paid but the sum of $136.65 *dollars*, paid the 29 day of December, though the same has long since been due.

Wherefore plaintiff prays judgment for the sum of six thousand dollars, for its costs, and for all proper relief.

JAMES M. SHACKELFORD,
S. B. VANCE, *Att'ys for Plaintiff.*

40 Whereupon there issued out of the office of the clerk of said court a summons in the words and figures following, to wit:

* * * * * * *

And afterwards, to wit, on Wednesday, October 6th, A. D. 1886, the said day being the third day of the October term, A. D. 1886, of said court, the following further proceedings in said cause were had, to wit:

Come now the defendant David J. Mackey, by his attorneys, Hovey & Menzies, and files his separate answer in the words and figures following, to wit:

United States Circuit Court for the District of Indiana, at Evansville.

THE BANK OF UNIONTOWN
vs.
MOUNT VERNON MILLS AND ELEVATOR COMPANY and DAVID J. MACKEY.

41 The defendant, David J. Mackey, by his attorneys, Hovey & Menzies, for answer to the second count of plaintiff's declaration says he admits the execution of the note sued upon in said court, the endorsement of the same by this defendant for the accom-odation of the Mount Vernon Mill & Elevator Company and George Naas, who signed said note as surety for said company; the plaintiff is the owner of said note in manner and form as alleged, and that this defendant executed the instrument of writing set forth in said court, dated the 20th day of November, 1885; but *my* plaintiff ought not to have and maintain this cause of action against this defendant, because, after the maturity of said note, to wit, on the 21st day of December, 1885, said George Naas died, in Posey county, State of Indiana, intestate, leaving residing therein a number of heirs whose Christian names are unknown to this defendant; that afterwards, to wit, on the 24th day of December,

42 1885, William Loudon was appointed administrator of the estate of said Naas by the Posey circuit court, and took upon himself the duties of the trust by taking the proper oath and giving the bond required by law.

That on the 29th day of December, 1885, after maturity of said note, plaintiff agreed with said mill & elevator company, in consideration that said company would pay plaintiff the interest then accrued on said note from the 22d day of November, 1885, to the 29th day of December, 1885, and the interest on said note, in advance, from the 29th day of December, 1885, to the 26th day of March, 1886, at the rate of eight per cent. per annum, to wit, the sum of

$133.33, that plaintiff would extend the time of the payment of said note until the 26th day of March, 1886.

That in pursuance of said agreement said mill & elevator
43 company did, on the 29th day of December, 1885, pay plaintiff the sum of $133.33 as interest accrued on said note from November 23rd, 1885, to the 29th day of December, 1885, and as advance interest on same from the 29th day of December, 1885, to the 24th day of March, 1886; and plaintiff, in consideration of said payment, did then and there extend the time of payment of said note to the 26th day of March, 1886; all of which was done without the knowledge or consent of this defendant or the knowledge or consent of the heirs of said George Naas or of William Loudon, administrator as aforesaid. Wherefore defendant prays payment for costs.

The defendant, David J. Mackey, for answer to the 4th count of plaintiff's declaration, says he admits the execution of the note sued upon in said court, the endorsement of the same by this defendant for the accom-odation of the Mount Vernon Mill & Elevator
44 Company and George Naas, who signed said note as surety for said company; that plaintiff is the owner of said note in manner and form as alleged, and that this defendant executed the instrument of writing set forth in said court, dated the 20th day of November, 1885, but says plaintiff ought not to have and maintain this cause of action against this defendant because after the maturity of said note, to wit, on the 21st day of December, 1885, said George Naas died, in Posey county, State of Indiana, intestate, leaving residing therein a number of heirs whose Christian names are unknown to this defendant.

That afterwards, to wit, on the — day of December, 1885, William Loudon was appointed administrator of the estate of said Naas by the circuit court of Posey county, and took upon himself the duties of the trust by taking the proper oath and giving the bond required by law.

45 That on the 29th day of December, 1885, after the maturity of said note, plaintiff agreed with said mill & elevator company, in consideration that company would pay plaintiff the interest then accrued on said note from the 29th day of November, 1885, to the 29th day of December, 1885, and the interest on said note, in advance, from the 29th day of December, 1885, to the 1st day of April, 1886, at the rate of eight per cent. per annum, to wit, the sum of $133.33, that plaintiff would extend the time of the payment of said note until the 1st day of April, 1886; that in pursuance of said agreement said mill & elevator company did, on the 29th day of December, 1885, pay plaintiff the sum of $133.33 as interest accrued on said note from the 29th day of November, 1885, to the 29th day of December, 1885, and as advance interest on same from the 29th day of December to the 1st day of April, 1886, and plaintiff, in consideration of said payment, did then and there extend
46 the time of payment of said note to the 1st day of April, 1886; all of which was done without the knowledge or consent

of the heirs of said George Naas or of William Louden, administrator aforesaid, or of this defendant.

Wherefore defendant prays payment for costs.

HOVEY & MENZIES,
Att'ys for David J. Mackey.

To the 2nd & 4th paragraphs of the plaintiff's declaration, and also his demurrer to the 1st & 3rd paraghaphs of said plaintiff's declaration in the words and figures following, to wit:

Circuit Court of the United States for the District of Indiana.

THE BANK OF UNIONTOWN
vs.
MOUNT VERNON MILL AND ELEVATOR COMPANY, DAVID J. MACKEY.

Demurrer to 1st Count.

47 The defendant David J. Mackey, by his attorneys, Hovey & Menzies, comes and says that the first court of plaintiff's declaration and the matters herein contained, in manner and form as the same are stated and set forth, are not sufficient in law for the plaintiff to have or maintain his said action thereof against this defendant, and that he, the said defendant, is not bound by law to answer the same; and this he is ready to verify. Wherefore, by reason of the insufficiencies of said court, the defendant prays judgment, and that plaintiff may be barred from having or maintaining his said action against him.

HOVEY & MENZIES,
Att'ys for David J. Mackey.

Demurrer to Third Court.

The defendant, David J. Mackney, by his attorneys, Hovey & Menzies, comes and says that the third court of plaintiff's declaration and the matters herein contained, in manner and form as
48 the same are stated and set forth, are not sufficient in law for the plaintiff to have or maintain his said action thereof against this defendant, and that he, the said defendant, is not bound by law to answer the same; and this he is ready to verify.

Wherefore, by reason of the insufficiency of said court, defendant prays payment, and that plaintiff may be barred from having or maintaining his said action against him.

HOVEY & MENZIES,
Att'ys for David J. Mackey.

And saith thereby that said declaration, as to said 1st & 3rd paragraphs thereof, as not good and sufficient in law.

And the court, having heard the argument of counsel and having — advised in the premises, doth now here sustain said demurrer as to said 1st & 3rd paragraphs of the complaint; to which ruling of the court the plaintiff now here, by its attorneys, excepts.

49 And, upon motion of the defendant, by his attorneys, a rule is entered requiring the plaintiff to file its reply.

Wherefore comes the plaintiff, by its attorneys, Shackelford and Vance, and files its demurrer in the words and figures following, to wit:

Circuit Court of the United States, District of Indiana, at Evansville.

THE BANK OF UNIONTOWN
vs.
MOUNT VERNON MILL AND ELEVATOR COMPANY, DAVID J. MACKEY.

The plaintiff, The Bank of Uniontown, demurs to the answer of defendant, and for cause of demurrer says the said answers does not contain facts sufficient to constitute a defense to its complaint herein.

And hereof it prays judgment.

SHACKELFORD & VANCE,
Atty's for Plaintiff.

To the defendants answer and saith thereby that said answer is
50 not good and sufficient in law.

And the court, having heard the argument of counsel and being advised in the premises, doth now here overrule said demurrer to said answer; to which ruling of the court the said plaintiff, by its attorneys, now here excepts.

And thereupon the said plaintiff, by its attorneys, Shackelford & Vance, files its reply in 3 paragraphs in the words and figures following, to wit:

Circuit Court of the United States, District of Indiana, at Evansville.

THE BANK OF UNIONTOWN
vs.
MOUNT VERNON MILL & ELEVATOR CO., DAVID J. MACKEY.

Par. (1.) The plaintiff, The Bank of Uniontown, for reply to the answer of defendant herein, says it denies each and every
51 allegation thereof.

Par. (2.) The plaintiff, for further reply to the defendant's answer, says it denies that there was paid on either of the notes therein mentioned, on the 29th day of December, 1885, the sum of $133.33 or any other sum, nor did plaintiff then or at any time agree to extend the time of the payment of said notes or either of them, *are* therein alleged, for any length of time; but plaintiff says that on said day the defendant The Mount Vernon Mill & Elevator Company was under promise to execute speedily new notes in renewal of the said notes in the answer mentioned, and then and there paid to plaintiff the sum of $273.30, which was to be applied in payment, in advance, of the interest on the said notes, when executed, until their maturity; and the said defendant failing to renew
52 said notes or either of them, the plaintiff has given the defendants credit as of said date on each of the notes in the

answer mentioned for one-half the said sum, being the sum of $136.65, which is the same payment mentioned in the complaint.

And plaintiff says that after the death of George Naas, to wit, on the 14th day of January, 1886, it was notified in writing by the administrator of his estate to institute suit on the said notes; that in compliance with said notice its cashier started promptly to the city of Mount Vernon, in this State, to institute such suit, and that the defendant David J. Mackey, who knew of the payments above stated and of all the facts pertaining to said notes and of the said notes and of plaintiff's purpose to sue thereon, then and there advised its said cashier not to institute such suit and promised he would pay
53 the said notes, and, relying on *on* said promise, plaintiff did not sue on said notes as by said notice and the law it was required to do.

And the plaintiff denies each and every other allegation in the said answer not hereinbefore denied or avoided, and it prays for all proper relief.

Par. (3.) And for further reply to the said answer the plaintiff says that the defendant David J. Mackey has been fully indemnified as endorser on the notes therein mentioned by the defendant The Mount Vernon Mill & Elevator Company by the payment of large sums of money, the conveyance of large quantities of real estate in Posey county, in this State, and by the transfer and delivery to him of bonds and other assets, the whole largely exceeding in value and amount the amount of the said two notes.

Plaintiffs pray- for its costs and for all proper relief.

SHACKELFORD & VANCE,
Att'ys for Pl'ff.

54 And now here comes the defendant David J. Mackey, by his attorneys, Hovey & Menzies, and files his demurrer in the words and figures following, to wit:

Circuit Court of the United States for the District of Indiana.

THE BANK OF UNIONTOWN,
vs.
THE MOUNT VERNON MILL & ELEVATOR COMPANY & DAVID J. MACKEY.

The defendant David J. Mackey, by Hovey & Menzies, his attorneys, come-, and as to the 2nd paragraphs of the plaintiff's reply to defendant's answer says that said paragraph and the matters and things therein contained, in manner and form as the same are therein stated and set forth, are not sufficient in law to preclude said defendant from maintaining his said defense as in said answer contained, and that said defendant is not bound by law to answer
55 the same; and this he is ready to verify.

Wherefore, by reason of the insufficiency of said reply, the defendant prays judgment, and that the plaintiff may be barred from having or maintaining his said action against him.

HOVEY & MENZIES,
Att'ys for Def't Mackey.

The defendant, David J. Mackey, by Hovey & Menzies his attorneys, comes, and as to the third paragraph of plaintiff'- reply to defendant's answer says that said paragraphs and the matters and things therein contained, in manner and form *are* the same are therein stated and set forth, are not sufficient in law to preclude said defendant from maintaining his said defense as in said answer contained, and that the said defendant is not bound by law to answer the same; and this he is ready to verify. Therefore, by reason
56 of the insufficiency of said reply, the defendant prays judgment, and that the plaintiff may be barred from having or maintaining his said action against him.

HOVEY & MENZIES,
Att'ys for said Mackey.

To the 2nd and 3rd paragraphs of the plaintiff's reply, and saith thereby that said reply as to said 2nd and 3rd paragraphs is not good and sufficient in law; and the court, having heard the argument of counsel and being advised in the premises, doth now here overrule said demurrer; to which ruling of the court the said defendant doth now here except.

And now here, the issues being joined, this cause comes on to be heard, and the said parties, plaintiff and defendant, having in writing stipulated that a jury might be waived, this cause is set for trial on submission to the court without the intervention of a jury;
57 and the court, having heard the evidence and argument of counsel, doth now here take the cause under advisement.

And afterwards, to wit, on Thursday, the 6th day of October, A. D. 1887, at the regular October term, 1887, of said court, the following further proceedings in said cause were had, to wit:

Come now the parties, by their counsel, and this cause coming on further to be heard, and the court, having had under consideration since its last term the evidence heretofore submitted in this cause, now files its special finding of facts and conclusions of law thereon and orders that the same be made part of the record; which said finding of facts and conclusions of law are in the words and figures following, to wit:

BANK OF UNIONTOWN
vs.
58 MT. VERNON MILL & ELEVATOR COMPANY, DAVID J. MACKEY.

At the request of the complainant the court finds the facts in this case specially—that is to say, as follows:

When the notes in suit were about to mature, to wit, November 20th, 1885, the plaintiff having signified to the principal debtor, the mill & elevator company, its willingness to extend the credit upon renewal notes made by the same parties who executed the original notes, but the surety, Naas, being too sick to join in the execution of new notes, the officers of the mill & elevator company prepared and procured the defendant Mackey to sign the writings

set out in the complaint, waiving presentment, protest, etc., of the notes in suit.

From this time until December 29th, 1885, various communications, verbal and written, passed between the officers of the
59 plaintiff bank and the officers or agents of the mill & elevator company in respect to the renewal of these notes, including a letter of the latter, dated December 2nd, 1885, which is of the tenor following:

MT. VERNON, IND., *Dec. 2nd*, 1885.

J. W. Jenkins, Esq., cashier, Uniontown, Ky.

DEAR SIR: Owing to Mr. George Naas's continued illness we have not as yet presented to him the matter of the renewal of our paper. Our Mr. Fuhrer explained the matter to your pres., Mr. Pike, when in your city. If you will kindly send us statement of int. for 4 mos., we will remit the amount; also please send few blank notes, so that we can have them filled out at earliest opportunity.

We are, etc., very truly,

W. L. BOYCE, *Treas.*

60 In reply to said letter the plaintiff sent to defendant the blank notes filled out for four months, ready for signature, and also a statement of the amount of interest, with the direction that the interest should be remitted along with the renewal notes.

On the 21st day of December Naas died intestate at his home in Mt. Vernon, Indiana, leaving children, and on December the 30th, 1885, William Louden was appointed administrator of his estate.

On the 29th day of December the mill & elevator company paid to the plaintiff and the plaintiff received the sum of two hundred and seventy-three dollars and thirty cents ($273.30) as and for the interest upon the notes in suit for four months on each from the date of maturity—that is to say, from the 23rd and 29th days respectively of November, 1885, until the 26th day of March
61 and the 1st day of April, 1886, and being interest in advance from December, 29th, 1885, until the last-named dates.

This payment of interest was made by a check of the tenor following.

"No. —. UNIONTOWN, KY., *Dec. 29th*, 1885.

Bank of Uniontown.

Pay to int. on two $5,000.00 notes —— —— or bearer two hundred and seventy-three & .30 dollars.

$273.30. MILL & ELEVATOR CO."

When this interest was paid and received the officers of the bank were ignorant of the death of George Naas and still expected the mill & elevator company to procure and deliver renewal notes as theretofore had been proposed.

Nothing was said at the time expressly in respect to an agreement for an extension of time, nor was anything said to qualify or affect

the legal force of the payment and receipt of the interest in
62 advance. Neither the heirs nor legal representatives of Naas knew of or ever afterwards assented to this payment of interest or to an extension of the time of payment on those notes.

The defendant Mackey neither at or before the time thereof had knowledge of this payment of interest and never afterwards did he assent to or ratify the transaction with a knowledge that it had been done without the consent of the heirs and of the representative of Naas.

WM. A. WOODS.

BANK OF UNIONTOWN
vs.
THE MT. VERNON MILL & ELAVATOR COMPANY, DAVID J. MACKEY.

Upon the facts specially founded in this case the court has,
63 as a matter of law, concludes that there was made an agreement for an extension of time and alleged in answer, whereby the heirs and representative of the estate of the surety, Naas, were released from liability on the notes in suit, and this having been done without the consent of the defendant Mackey he is also released from liability and is entitled to judgment in his favor upon the issues joined and for his costs.

WM. A. WOODS.

And the plaintiff then and there, by its counsel, excepted to the said conclusions of law and each of them.

And upon motion of plaintiff, by its attorneys, this cause is dismissed without prejudices as to the defendant The Mt. Vernon Mill & Elevator Company, it appearing to the court that said defendant has not been served with process herein.

64 It is further considered and adjudged by the court that as to defendant David J. Mackey the plaintiff take nothing by its complaint, and that said Mackey recover of and from the plaintiff his costs in this behalf laid out and expended; to which judgement of the court the plaintiff excepts and prays its writ of error to the Supreme Court of the United States, which is allowed by the court, and its bond is fixed in the sum of five hundred dollars, and sixty days' time is allowed to make and file said bond.

And afterwards, to wit, on Saturday, the 5th day of November A. D. 1887, the following further proceedings in said cause were had, to wit:

Comes this day the plaintiff, by its attorneys, Mess. Vance & Shackelford, and files its bond on writ of error to the Supreme Court in the penal sum of five hundred dollars, with B. Weil as
65 surety; and the said bond being read and examined is hereby approved and filed.

66 UNITED STATES OF AMERICA, } ss:
District of Indiana, }

I hereby certify that the above and foregoing is a full, true, complete, and exact copy and transcript of the record and proceedings had in the case of The Bank of Uniontown *v.* The Mount Vernon Mill and Elevator Company and David J. Mackey as fully as the same appears of record on file in my office, at Evansville, in said district.

Witness my hand and the seal of said circuit court this 30th day of January, A. D. 1888.

[Seal of the United States Circuit Court, Dist. of Ind.]

N. C. BUTLER, *Clerk.*

67 Supreme Court of the United States.

THE BANK OF UNIONTOWN }
vs. } In Error.
DAVID J. MACKEY. }

Of October term, in the year of our Lord one thousand eight hundred and eighty-eight.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said The Bank of Uniontown, by James M. Shackelford and S. B. Vance, its attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said David J. Mackey against the said The Bank of Uniontown, whereas by the law of the land the said judgment ought to have been given for the said The Bank of Uniontown against the said David J. Mackey; and the said The Bank of Uniontown prays that
68 the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it hath lost by occasion of the said judgment.

JAMES M. SHACKELFORD,
S. B. VANCE,
Attorneys for Plaintiff in Error.

Filed Feb'y 8th, 1888.

N. C. BUTLER, *Clerk.*

Endorsed on cover: Indiana C. C. U. S. No. 327. The Bank of Uniontown, plaintiff in error, *vs.* David J. Mackey. Filed February 11, 1888.

FILED
MAR 18 1895
JAMES H. McKENNEY
CLERK

NO. 327

SUPREME COURT OF THE UNITED STATES.

THE BANK OF UNIONTOWN,
Plaintiff in Error.

vs.

DAVID J. MACKEY,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF INDIANA.

BRIEF FOR PLAINTIFF IN ERROR.

S. B. VANCE,
Att'y for Plaintiff in Error.

66 UNITED STATES OF AMERICA, *District of Indiana,* } ss:

I hereby certify that the above and foregoing is a full, true, complete, and exact copy and transcript of the record and proceedings had in the case of The Bank of Uniontown *v.* The Mount Vernon Mill and Elevator Company and David J. Mackey as fully as the same appears of record on file in my office, at Evansville, in said district.

Witness my hand and the seal of said circuit court this 30th day of January, A. D. 1888.

[Seal of the United States Circuit Court, Dist. of Ind.]

N. C. BUTLER, *Clerk.*

67 Supreme Court of the United States.

THE BANK OF UNIONTOWN *vs.* DAVID J. MACKEY. } In Error.

Of October term, in the year of our Lord one thousand eight hundred and eighty-eight.

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68 the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it hath lost by occasion of the said judgment.

JAMES M. SHACKELFORD,
S. B. VANCE,
Attorneys for Plaintiff in Error.

Filed Feb'y 8th, 1888.

N. C. BUTLER, *Clerk.*

Endorsed on cover: Indiana C. C. U. S. No. 327. The Bank of Uniontown, plaintiff in error, *vs.* David J. Mackey. Filed February 11, 1888.

Office Supreme Court U. S.
FILED,
MAR 18 1891
JAMES H. McKENNEY,
CLERK.

NO. 327

SUPREME COURT OF THE UNITED STATES.

THE BANK OF UNIONTOWN,
Plaintiff in Error,

vs.

DAVID J. MACKEY,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF INDIANA.

BRIEF FOR PLAINTIFF IN ERROR.

S. B. VANCE,
Att'y for Plaintiff in Error.

NO. 327.

SUPREME COURT OF THE UNITED STATES.

THE BANK OF UNIONTOWN,

Plaintiff in Error,

vs.

DAVID J. MACKEY,

Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF INDIANA.

BRIEF FOR PLAINTIFF IN ERROR.

CASE.

The Bank of Uniontown, plaintiff in error, is a Kentucky corporation doing business at Uniontown, in Union county, Kentucky, and, by its act of incorporation was authorized among other things to "deal in the loaning of money, to buy and sell bills of exchange, promissry notes and other evidences of debt.

The Mount Vernon Mill & Elevator Company, a corporation organized and doing business under the laws of Indiana, and in Posey county, in said State, and one George Naas, a citizen of

said State, made to David J. Mackey, the defendant in error, and also a citizen of said State, as D. J. Mackey, their promissory note in the words and figures:

$5,000.00. UNIONTOWN, KY., July 20, 1885.
Four months after date we promise to pay to the order of D. J. Mackey five thousand dollars, at the Bank of Uniontown, at Uniontown, Ky., value received, with interest at the rate of eight per cent. per annum after maturity until paid. If collected by suit we agree to pay a reasonable attorney fee.

W. C. FUHRER, *P't.*
GEORGE NAAS.

W. L. BOYCE,
Sec'y. and Treas.

The seal of the Mt. Vernon Mill & Elevator Company was also affixed.

Of date July 29, 1885, the same parties executed to said Mackey their other note, for the same amount, and in all respects similar to that above copied.

The said two notes were, by said Mackey, endorsed in blank, for the accommodation of the Mount Vernon Mill & Elevator Company, the principal in said notes, the said Naas being only surety therein. The purpose and intent of such endorsement were that the Elevator Company should procure the said two notes to be discounted at the Bank of the plaintiff in error, and they were, about their date actually discounted by said plaintiff who paid to the Elevator Company, for each of them, the sum of $4,865, being their face value, less the sum of $135.00, the agreed discount, in lieu of interest upon the sums so paid therefor. A short time before the maturity of the said notes, to-wit, on the 20th day of November, 1885, the defendant Mackey, by two separate instruments of writing made and signed by him and by him delivered to the plaintiff, waived presentment for payment, protest and notice of protest of said notes, and consented that the time for the payment thereof might be extended until he should give written notice to the contrary. The said instruments of writing referred, each, to one of the said notes, and omitting dates, were as follows, viz:

"This memorandnm witnesseth that in the matter of a certain promissory note for ($5,000) five thousand dollars, dated July——1885, and due November——1885, wherein the Mount Vernon Mill & Elevator Company and George Naas are makers and D. J. Mackey is endorser, the undersigned hereby waives presentment for payment, protest, notice of protest, and consents that the payment thereof may be extended until he gives written notice to the contrary.

"Dated at Evansville, Indiana, this 20th day of November, 1885."

The complaint is upon these two notes and contains four paragraphs. Of these, the first and third are identical, but that, they relate, each, to a different note; and after reciting the foregoing facts, contain, each, the following averments:

"And the plaintiff says that the note herein sued on is the note intended in the said instrument of writing. At the time of making and delivery of the said instrument of writing the said George Naas, surety, in the said note, was ill of his last sickness, and by reason thereof, unable to transact or consider any matter of business, as the defendant Mackey well knew; and the defendant, the Mount Vernon Mill & Elevator Company desiring to renew said note or to have further time on same, should not said Naas in a reasonable time sufficiently recover to unite in the renewal thereof, procured the defendant Mackey to execute the said writing so that such extension of time might be obtained—and after the making and delivery to it of the said instrument of writing and after the maturity of the said note, to-wit: on the 29 day of December, 1885, the said Naas not having recovered sufficiently to transact any business, or to renew said note, or consent to an extension of time for payment thereof, the interest on said note for four months was paid by the said Mill & Elevator Company, and the time for the payment thereof was extended until the — day of ——— 1886 being four months from the maturity thereof."

"The said George Naas has departed this life."

in consideration that said Company would pay plaintiff the interest then accrued on said note from the 22d day of November, 1885, to the 29th day of December, 1885, and the interest on said note, in advance, from the 29th day of December, 1885, to the 26th day of March, 1886, at the rate of eight per cent. per annum, to-wit. the sum of $133.33, that plaintiff would extend the time of the payment of said note until the 26th day of March, 1886."

"That in pursuance of said agreement said mill and elevator company did, on the 29th day of December, 1885, pay plaintiff the sum of $133.33, as interest accrued on said note from November 23d, 1885, to the 29th day of December, 1885, and as advance interest on same from the 29th day of December, 1885, to the 24th day of March, 1886; and plaintiff in consideration of said payment, did then and there extend the time of payment of said note to the 26th day of March, 1886; all which was done without the knowledge or consent of this defendant, or the knowledge or consent of the heirs of said George Naas, or of William Loudon, administrator as aforesaid."

To that answer the plaintiff made the following reply;

Par. 1. The plaintiff, The Bank of Uniontown, for reply to the answer of defendant herein, says, it denies each and every allegation thereof."

Par. 2. The plaintiff for further reply to the defendant's answer, says, it denies that there was paid on either of the notes therein mentioned, on the 29th day of December, 1885, the sum of $133.33, or any other sum; nor did plaintiff then or at any time agree to extend the time of the payment of said notes or either of them as therein alleged, for any length of time; but plaintiff says that on said day the defendant The Mount Vernon Mill & Elevator Company was under promise to execute speedily new notes in renewal of the said notes in the answer mentioned, and then and there paid to plaintiff the sum of $273.30, which was to be applied in payment, in advance, of the interest in said notes when executed, until their maturity; and the said defendant

failing to renew said notes or either of them, the plaintiff has given the defendants credit as of said date on each of the notes in the answer mentioned, for one half the said sum, being the sum of $136.65, which is the same payment mentioned in the complaint."

And then the record is as follows, viz:

"And now here, the issue being joined, this cause comes on to be heard, and said parties, plaintiff and defendant, having in writing stipulated that a jury might be waived, this cause is set for trial on submission to the court without the intervention of a jury; and the court, having heard the evidence and argu-
57 ment of counsel, doth now here take the cause under advisement.*

And afterwards, to wit, on Thursday, the 6th day of October, A. D., 1887, at the regular October term, 1887, of said court, the following further proceedings in said cause were had, to wit:

Come now the parties by their counsel, and this cause coming on further to be heard, and the court, having had under consideration since its last term the evidence heretofore submitted in this cause, now files its special finding of facts and conclusions of law thereon and orders that the same be made part of the record; which said finding of facts and conclusions of law are in the words and figures following, to wit:

BANK OF UNIONTOWN)
vs.)
58 MT. VERNON MILL & ELEVATOR CO., DAVID J. MACKEY.)

At the request of the complainant the court finds the facts in this case specially—that is to say, as follows:

When the notes in suit were about to mature, to wit, November 20th, 1885, the plaintiff having signified to the principal debtor, the mill & elevator company, its willingness to extend the credit upon renewal notes made by the same parties who executed the original notes, but the surety, Naas, being too sick to join in the execution of new notes, the officers of the mill & elevator company prepared and procured the defendant Mackey to sign the writings set out in the complaint, waving presentment, protest, etc., of the notes in suit.

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*References are to pages of original, being side pages of printed transcript.

From this time until December 29th, 1885, various communications, verbal and written, passed between the officers of
59 the plaintiff bank and the officers or agents of the mill & elevator company in respect to the renewal of these notes, including a letter of the latter, dated December 2d, 1885, which is of the tenor following:

MT. VERNON, IND., *Dec. 2d*, 1885.

J. W. Jenkins, Esq., cashier, Uniontown, Ky.

DEAR SIR: Owing to Mr. George Naas's continued illness we have not as yet presented to him the matter of the renewal of our paper.

Our Mr. Fuhrer explained the matter to your pres., Mr. Pike, when in your city. If you will kindly send us statement of int. for 4 mos., we will remit the amount; also please send few blank notes, so that we can have them filled out at earliest opportunity.

We are, etc., very truly.

W. L. BOYCE, *Treas.*

60 In reply to said letter the plaintiff sent to defendant the blank notes filled out for four months, ready for signature and also a statement of the amount of interest, with the direction that the interest should be remitted along with the renewal notes.

On the 21st day of December Nass died intestate at his home in Mt. Vernon, Indiana, leaving children, and on December 30th, 1885, William Louden was appointed administrator of his estate.

On the 29th day of December the mill & elevator company paid to the plaintiff and the plaintiff received the sum of two hundred and seventy-three dollars and thirty cents ($273.30) as and for the interest upon the notes in suit for four months on each from the date of maturity—that is to say, from the 23rd and 29th days respectively of November, 1885, until the 26th
61 day of March and the 1st day of April, 1886, and being interest in advance from December 29th, 1885, until the last named dates.

This payment of interest was made by a check of the tenor following.

No. ——. UNIONTOWN, KY., *Dec. 29th*, 1885.

Bank of Uniontown.

Pay to int. on two $5.000.00 notes ———— or bearer two hundred and seventy-three & .30 dollars.

$273.30. MILL & ELEVATOR CO.

When this interest was paid and received the officers of the bank were ignorant of the death of George Naas and still expected the Mill & Elevator Company to procure and deliver renewal notes as theretofore had been proposed.

Nothing was said at the time expressly in respect to an agreement for an extension of time, nor was anything said to qualify or affect the legal force of the payment and receipt of the interest in advance. Neither the heirs nor legal representatives of
62 Naas knew of or ever afterwards assented to this payment of interest or to an extension of the time of payment on those notes.

The defendant Mackey neither at or before the time thereof had knowledge of this payment of interest and never afterwards did he assent to or ratify the transaction with a knowledge that it had been done without the consent of the heirs and of the representative of Naas.

WM. A. WOODS.

BANK OF UNIONTOWN
vs.
THE MT. VERNON MILL & ELEVATOR CO., DAVID J. MACKEY.

Upon the facts specially found in this case the court as a
63 matter of law, concludes that there was made an agreement for an extension of time as alleged in answer, whereby the heirs and representative of the estate of the surety, Naas, were released from liability on the notes in suit, and this having been done without the consent of the defendant Mackey he is also released from liability and is entitled to judgment in his favor upon the issues joined and for his costs.

WM. A. WOODS.

And the plaintiff then and there, by its counsel, excepted to the said conclusions of law and each of them.

And upon motion of plaintiff, by its attorneys, this cause is dismissed without prejudice as to the defendant The Mt. Vernon Mill & Elevator Company, it appearing to the court that said defendant has not been served with process herein.

It is further considered and adjudged by the court that
64 as to defendant David J. Mackey the plaintiff take nothing by its complaint, and that said Mackey recover of and from the plaintiff his costs in this behalf laid out and expended; to which judgment of the court the plaintiff excepts and prays its writ of error to the Supreme Court of the United States, which is allowed by the court, and its bond is fixed in the sum of five hundred dollars, and sixty days' time is allowed to make and file said bond.

II.

ASSIGNMENT OF ERRORS.

The errors assigned by the plaintiff are as follows:

1. That the court erred in sustaining the demurrers of the defendant to the first and third paragraphs of its complaint.

2. That the court erred in its conclusions of law, viz, that there was made an agreement for an extension of time as alleged in answer, whereby the heirs and representatives of the estate of the surety Naas, were released from liability on the notes in suit, and this having been done without the consent of the defendant Mackey, he is also released from liability, and is entitled to judgment in his favor upon the issues joined and for his costs.

3. That the court erred in refusing to render judgment in its favor against the defendant Mackey for the two notes in its complaint mentioned and in adjudging "that as to defendant David J. Mackey the plaintiff take nothing by its complaint, and that said Mackey recover of and from the plaintiff his costs in this behalf laid out and expended."

III.

ARGUMENT.

A. We will consider first the second error assigned (2) "that the court erred in its conclusions of law."

The defense to this action is that the defendant in error was only the endorser of the notes sued on, and that one George Naas was the surety therein and liable thereon in advance of him. That on the 29th day of December, 1885, after the maturity of said notes the "plaintiff agreed with said Mill and Elevator Company principal therein, "in consideration that said Company would pay plaintiff the interest then accrued on the said notes, and also the interest thereon in advance from the 29th day of December, 1885, to the 26th day of March, 1886, on one of them, and on the other to the 1st day of April, 1886," at the rate of

eight per cent. per annum, to-wit, the sum of $133.33, that plaintiff would extend the time of the payment of said notes, respectively, to the said last named dates; and, "that in pursuance of said agreement said Mill & Elevator Company did on the 29th day of December, 1885, pay plaintiff, on each of said notes the said sum of $133.33 as interest thereon, accured and in advance to the said dates respectively; and that the "plaintiff, in consideration of the said payment, did then and there extend the time of payment of said notes," the one to the 26th day of March and the other to the 1st day of April, 1886—all which was done without the knowledge or consent of this defendant, or the knowledge or consent of the heirs of said George Naas or of William Loudon, administrator of said Naas.

The court does not find, as a *fact*, that there was such a contract as that alleged in the answer, but, "upon the facts specially found in this case the court, as matter of law, concludes that there was made an agreement for an extension of time as alleged in the answer."

Counsel submits, with the greatest respect, that herein is a material error, and that the "facts specially found in this case" by the court do not authorize the conclusion that there was such "an agreement for the extension of time as is alleged in the answer;" but that, on the contrary, the facts so "specially found" prove that the only extension of time for the payment of the said notes proposed or intended by the plaintiff, or understood by the Mill and Elevator Company was upon renewal notes made by the same parties who executed the original notes.

The facts specially found from which the court concludes that there was made an extension of time as alleged in the answer are as follows, viz. (p 61): "On the 29th day of December the Mill & Elevator Company paid to the plaintiff and the plaintiff received the sum of two hundred and seventy three dollars and thirty cents ($273.30) as and for the interest upon the notes in suit for four months on each from the date of

maturity, that is to say, from the 23d and 29th days respectively of November, 1885, until the 26th day of March and the 1st day of April, 1886, and being interest in advance from December 29th, 1885, until the last named dates."

"This payment of interest was made by a check of the tenor following:

No.—— UNIONTOWN, KY., *Dec. 29th*, 1885.

Bank of Uniontown.

Pay to int. on two $5,000.00 notes ——— or bearer two hundred and seventy three & .30 dollars.

$273.30. MILL & ELEVATOR CO.

* * * * * * * * * * *

"Nothing was said at the time expressly in respect to an agreement for an extension of time, nor was anything said to qualify or affect the legal force of the payment and receipt of the interest in advance."

There is no other fact found, than the bare payment and receipt of interest as above stated, which tends in any degree to show a contract or agreement for an extension of time.

The payment of interest in advance is a sufficient consideration for an agreement to forbear, and may of itself be sufficient *prima facie* evidence of such agreement.

Daniel (Negotiable Ins., § 1317) says: "The payment of legal interest in advance will uphold an agreement for forbearance and discharge the surety; and a note for the interest will be equal to its payment in advance."

Brandt, (Suretyship and Guaranty, § 305) says: "The payment of legal interest on a debt in advance is a sufficient consideration to support an agreement for an extension of the time of payment thereof. The decided weight of authority, and it seems the better reason, is that the payment in advance of interest on the debt by the principal to the creditor is, of itself, without more, sufficient prima facie evidence of an agreement to extend

the time of payment for the period for which the interest is paid, and works the discharge of the surety. * * The payment of the interest in advance is not of itself a contract to delay, but is evidence of such contract, and while this evidence may be rebutted, yet in the absence of any rebutting evidence it becomes conclusive."

Preston vs. Henning & Speed, (6 Bush, Ky., p 556) was an action against Preston on a note for $3,000, in which he was surety. There had been made on the note, by the principal and without the knowledge of the surety, six annual payments of interest in advance, and the court says, while it appears that appellees did not intend that their receipt of any of the payments, "should have the legal effect of releasing the appellant, we cannot resist the conclusion that all the payments made were of interest in advance; and it is equally clear that these payments were made by John Preston in consideration of forebearance, which, if not expressly promised, it was understood by him, would be given." And the court in that case thus states the rule and the reason of it (p 560). "It is a familiar principle * * that where a creditor, by a written or verbal contract with the principal debtor, has for a valid consideration agreed to forbear to pursue his legal remedy on the original contract, without the consent of the surety, and has thereby changed the original attitude of the parties, by tying his own hands, or otherwise obstructing the legal or equitable rights of the surety; the surety is thereby exonerated. And it may be regarded as a settled proposition of law that the payment in advance, of interest, is a sufficient and binding consideration for stipulated indulgence. But it is equally well settled that mere forbearance or passive indulgence by the obligee, or even forbearance upon an assurance thereof to the principal debtor, will not release the surety, unless such indulgence is given or to be given in compliance with an enforcible contract, founded on some valuable consideration; for it is the *act* of the creditor, depriving himself of the *power of*

suing by something *obligatory* upon him, and which therefore operates to suspend or frustrate the incidental or correlative rights of the surety, which operates to release the latter. Therefore, although a sufficient consideration may have passed to the obligee to support an express promise of indulgence, or from which a binding agreement to indulge the obligor might be inferred in the absence of counteractive evidence, and though indulgence be given, yet the surety will not be released unless there is a stipulation express or implied, on the part of the obligee to give indulgence, for it is that which postpones the right of action, and constitutes a novation of the contract."

In that case there being no evidence "counteractive" of the inference to be drawn from the payments of interest "by John Preston in consideration of forbearance which, if not expressly promised, it was understood by him would be given, "the court says, "The prepayment of interest being made as the price of indulgence, and received by the appellee with knowledge of that fact, and without notice to the payer that forbearance thus paid for would not be given, they were bound by an implied promise to forebear to sue until the expiration of the time for which the interest was paid."

But it is clearly the doctrine of that case that the mere payment of interest in advance does not create a conclusive presumption of an agreement to forbear, and that if there be other evidence in the case proving that such was not the contract of the parties, that the principal debtor did not understand, nor the creditor intend that the right to forbearance should result from the mere pay ent of interest, then the surety would not be released.

"Although a sufficient consideration may have passed to the obligee * * * from which a binding agreement to indulge the obligor might be inferred in the absence of counteractive evidence, * * yet the surety will not be released unless there is a stipulation, express or implied, on the part of the obligee to give

indulgence"—and no stipulation to give indulgence can be *implied*, contrary to the manifest intention of the parties

Says Daniel, (Neg. Ins.) §1,315: "The following elements or circumstances must unite in order to constitute an indulgence which will discharge the surety. *First*, a consideration, for without it the promise would not be binding. *Second*, a promise, or agreement to indulge, for without it the hands of the creditor are not tied, although he may have received collateral security for the debt."

§1,316, "It is well settled that there must be a valid common law agreement, in binding legal form to give time to the maker or acceptor in order to discharge the drawer or indorser"

§1,318, "There must be an absolute agreement for indulgence by extension of time or forbearance to sue; for an agreement based upon a condition which is uncomplied with, is not binding, and therefore does not discharge those who occupy the relation of sureties, but leaves all parties unaffected." It is of course needless to call the attention of this court to the definition of a contract—and yet, in opposition to the opinion of the very able Circuit Judge, counsel feels the need of every available light.

Pollock (Con. p 1–5) says: "Let us now see how many things are included in the consent that makes a legal agreement. * * The first thing we observe is that it takes not less than two persons to make it. * * The next thing is that these persons have a distinct intention, and the intention of both or all of them is the same. Without this, one obviously cannot say there is an agreement. Next, they must be aware that their intentions agree; in other words, they must communicate them to one another, for it is again obvious that uncommunicated intentions, however exactly they correspond, do not make an agreement."

"The result then comes out in this way: When two or more persons concur in expressing a common intention so that rights or duties of those persons are thereby determined, this is an agreement."

"The central part of this group of ideas is that the parties concur in expressing a common intention. * * They must be assured by mutual communication that a common intention exists, that they mean the same thing in the same sense."

"The mutual communication which makes up an expression of intention for the purposes of legal agreement consists of proposal and acceptance"

"A contract is an *agreement* which produces an obligation."

In the light of the foregoing definition and illustration of a contract, counsel submits that the facts found specially by the court do not prove a contract, a legal agreement between the plaintiff and the Elevator Company for an extension of the time on these notes, but on the contrary they prove that there was no contract for that purpose.

First then, as to the "proposal" made by the plaintiff. The court finds (p 58):

(a) When the notes in suit were about to mature, to-wit November 20th, 1885, the plaintiff having signified to the principal debtor, the Mill & Elevator Company, its willingness to extend the credit upon renewal notes made by the same parties who executed the original notes, but the surety, Naas, being too sick to join in the execution of new notes, the officers of the Mill & Elevator Company prepared and procured the defendant Mackey to sign the writings set out in the complaint, waiving presentment, protest, &c., of the notes in suit."

The "proposal" then was to extend the credit upon the renewal of the notes.

(b) "From this time until December 29th, 1885, various communications, verbal and written, passed between the officers of the plaintiff bank and the officers or agents of the Mill
59 & Elevator Company in respect to the renewal of these notes."

All their communications were about the plaintiff's "proposal" for a renewal of these notes.

(c) These communications included "a letter of the latter dated December 2d, 1885. which is of the tenor following:

MT. VERNON, IND., *Dec. 2d.*, 1885.

J. W Jenkins, Esq., Cashier, Uniontown, Ky.

DEAR SIR—Owing to Mr. George Naas' continued illness we have not as yet presented to him the matter of the renewal of our paper. Our Mr. Fuhrer explained the matter to your Pres., Mr. Pike, when in your city. If you will kindly send us statement of int. for 4 mos. we will remit the amount; also please send few blank notes, so that we can have them filled out at earliest opportunity.

We are, etc., very truly,

W. F. BOYCE, *Treas.*

Here was an acceptance in writing of the plaintiff's "proposal" to "extend the credit upon renewal notes made by the same parties"—but it included also a *proposal* by the debtor to pay the interest for the proposed extension at once. But that was not intended as a substitute for the plaintiff's proposition, nor that its acceptance would entitle the Elevator Company to an extension of the time. That was conditioned upon the renewal of the notes.

(d) "In reply to said letter the plaintiff sent to defendant the blank notes filled out for four months, ready for signature and also a statement of the amount of interest, with the direction that the interest should be remitted along with the renewal notes." Nothing can be clearer than that up to this time neither of the parties contemplated any extension of the time, except upon condition of the renewal of the notes—that the Bank had never made any other "proposal" nor the Elevator Company ever expressed any other intention.

The court then finds that,

(e) "On the 21st day of December Naas died intestate at his home in Mt. Vernon, Ind., and that "on the 29th day of December the Mill & Elevator Company paid to the plaintiff and the

plaintiff received the sum of $273.30, as and for the interest upon the notes in suit for four months on each from the date of maturity," and that nothing was then said about an extension of time. But the court also finds that,

(f) "When this interest was paid and received the officers of the bank were ignorant of the death of George Naas and still expected the Mill & Elevator Company to procure and deliver renewal notes as theretofore had been proposed" The Bank could not have so expected had the Mill & Elevator Company communicated its intention not to renew the notes, or its understanding that the interest was accepted as the price of indulgence; nor could it have so expected, had it understood that its "proposal" had been withdrawn, or modified, or that the Elevator Company expected an extension of time in consideration of the interest paid, and without a renewal of the notes.

If the Elevator Company intended by the payment of interest to purchase an extension of time it certainly concealed its intention from the Bank, as it did the death of Naas. The Bank certainly had no such intention. And to give to the payment of interest in this case the force of a contract for an extension of time, is to force the parties into a contract which they never intended.

Herein this case differs essentially from that of Preston vs. Henning & Speed, before cited. In that case, John Preston, the principal debtor, paid the interest on his note, in advance, for year after year, with the understanding that he was buying an extension of time, and the holders of the note received the interest "with knowledge of that fact, and without notice to the payer that forbearance thus paid for would not be given." The court therefore held that "they were bound by an implied promise to forbear to sue until the expiration of the time for which the interest was paid." To have held otherwise in that case, would have been to allow the creditor to practice a fraud upon his debtor. Here the creditor does not intend the debtor to have, nor under-

stand that the debtor expects, an extension of time for the payment of interest— but, as the court finds, understood "and still expected the Mill & Elevator Company to procure and deliver renewal notes as theretofore had been proposed." And to hold that without such renewal the debtor is entitled to an extension of time would be to allow him, in this case to practice a fraud upon the creditor.

In that case the creditor having made a contract with his debtor sought to obviate its effects as to the surety by a secret and unexpressed intention.

In this case, the creditor having made no contract, it is sought in behalf of the surety, to give to an isolated fact, the force of a contract contrary to the understanding and expressed intention of the parties.

To construe the plaintiff into a contract without the performance of that condition by its debtor violates the rule as stated by Daniel—that, "an agreement based upon a condition which is uncomplied with is not binding, and therefore does not discharge those who occupy the relation of sureties but leaves all parties unaffected."

In McLemore vs Powell (12 Wheaton, 554) this court after stating that for the discharge of an indorser, "the agreement must be one binding in law upon the parties, and have a sufficient consideration" approves (p 558) a ruling in Badnale vs. Samuel, 3 Price's Exch. a suit by the holder against a prior indorser of a bill of exchange, "that a treaty for delay between the holder and acceptor, upon terms which were not finally accepted, did not discharge the defendant, although an actual delay had taken place during the negotiation, because there was no binding contract, which precluded the plaintiff's from suing the acceptor at any time," This but confirms the proposition of Daniel. Counsel therefore submits that the second assignment of error is well made. "That the court erred in its conclusions of law, viz: 'That there was made an agreement for an extension of time as

alleged in the answer, whereby the heirs and representative of the estate of the surety Maas" and also the defendant Mackey, the indorser, were released from liability upon the note, in suit. If that be so, it follows that the judgment for the defendant is erroneous.

B.

Counsel is also of opinion that the first assignment of error is well made—"that the court erred in sustaining the demurrer of the defendant to the first and third paragraphs of its complaint." That depends upon the interpretation of the two instruments of writing made by the defendant, and set forth on pages 14 and 29 of the transcript, and which, omitting the dates of the notes are as follows: "This memorandum witnesseth that in the matter of a certain promissory note for five thousand dollars * * * wherein the Mount Vernon Mill & Elevator Company and George Naas are makers, and D. J. Mackey is endorser, the undersigned hereby waives presentment for payment, protest, notice of protest, and consents that the payment thereof may be extended until he gives written notice to the contrary."

The gist of the controversy is what was intended by the words—"and consents that the payment thereof may be extended until he gives written notice to the contrary."

The plaintiff being a bank incorporated under a law of the Commonwealth of Kentucky, the notes sued on when discounted by it were "placed on the same footing as foreign bills of exchange;" and the defendant, without a waiver, would be held to his liability only, by their "presentment for payment protest, and notice of protest." That waiver was made by the instrument above cited. After that, the plaintiff, unless required in writing by the surety or endorser, to sue, could have indulged the principal until the statute of limitations had released them. The consent of defendant "that the payment thereof may be extended" did not therefore intend to authorize a mere passive indulgence,

since no authority was needed for that. It must then have intended that the Mill & Elevator Company might contract for an extension of time, and, if contract, fora definite time; since no other sort of contract could have assured any extension of time. And if it intended an extension for a definite time, then why not for four months, as these paragraphs allege was done. The court knows judicially that four months is Bank time—these were four months notes, and the court finds that plaintiff sent to the Elevator Company; "notes filled out for four months" for their renewal. An extension for four months was therefore in harmony with the dealing of the parties.

The defendant intended that these notes might be extended for four months, and then extended again, "until he gives written notice to the contrary." The facts alleged in the complaint and admitted by the demurrer, show why such consent was given. They are, that, "At the time of the making and delivery of the said instrument of writing the said George Naas, surety in the said note, was ill of his last sickness, and by reason thereof unable to transact, or consider, any matter of business, as the defendant Mackey well knew; and the defendant the Mount Vernon Mill & Elevator Company desiring to renew said note, or to have further time on same should not said Naas in a reasonable time sufficiently recover to unite in the renewal thereof, procured the defendant Mackey to execute the said writing so that such extension of time might be obtained. In the light of these admitted facts that writing seems to admit of no other construction than that given it. They show too that Naas, the surety was not to be consulted, nor does the writing intend that he should be.

In Rochester Savings Bank vs. Chick, (64 N. H. 410) a promissory note contained the stipulation that "all the signers agree to be holden should the time of payment be extended." That stipulation was held to bind a surety to one extension for a definite time, but not to "an indefinite extension of the time of payment made by agreement between the principal and payee."

That stipulation does not differ, in effect, from the *consent* in the writing executed by defendant, except that the latter authorizes repeated *extensions*, until he gives written notice to the contrary.

If the foregoing be the correct interpretation of the said writing, then, even if there was a contract for the extension of time, it was by the consent of defendant who was therefore not released. That Naas had died was immaterial. The court finds that when the interest was paid and received the officers of the bank were ignorant of the death of George Naas," and still expected the renewal notes. The effect of the alleged contract upon defendant's rights was not other as to his administrator than as to Naas himself.

It was therefore error to sustain the demurrer to the first and third paragraphs of the complaint.

For the errors indicated counsel respectfully submits that the judgment of the Circuit Court should be reversed.

S. B. VANCE,

Att'y for Plaintiff in Error.

No. 327.

SUPREME COURT OF THE [illegible]

BANK OF BRIGHTOWN,
Plaintiff in Error,
vs.
DAVID J. MACKEY,
Defendant in Error.

Error to the Circuit Court of the United States for the District of [illegible].

BRIEF FOR DEFENDANT IN ERROR.

[illegible]
Attorney for Defendant in Error.

That stipulation does not differ, in effect, from the *consent* in the writing executed by defendant, except that the latter authorizes repeated *extensions*, until he gives written notice to the contrary.

If the foregoing be the correct interpretation of the said writing, then, even if there was a contract for the extension of time, it was by the consent of defendant who was therefore not released. That Naas had died was immaterial. The court finds that when the interest was paid and received the officers of the bank were ignorant of the death of George Naas," and still expected the renewal notes. The effect of the alleged contract upon defendant's rights was not other as to his administrator than as to Naas himself.

It was therefore error to sustain the demurrer to the first and third paragraphs of the complaint.

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Att'y for Plaintiff in Error.

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No. 327.

Supreme Court of the United States.

BANK OF UNIONTOWN,
Plaintiff in Error.

vs.

DAVID J. MACKEY,
Defendant in Error.

Error to the Circuit Court of the United States for the District of Indiana.

BRIEF FOR DEFENDANT IN ERROR.

G. V. MENZIES,
Attorney for Defendant in Error.

No. 327.

SUPREME COURT OF THE UNITED STATES.

BANK OF UNIONTOWN,
Plaintiff in Error,

vs:

DAVID J. MACKEY,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR DEFENDANT IN ERROR.

CASE.

Although the facts are set forth correctly in plaintiff's brief, we will succintly relate the controlling ones raised by the issues.

The record shows, as undisputed facts, that defendant endorsed in blank for the accommodation of the Mt. Vernon Mill and Elevator Company the notes declared upon; that said notes were signed by George Naas, as surety for the Mount Vernon Mill and Elevator Com-

pany, before defendant's endorsement. That plaintiff purchased or discounted the notes, knowing that Naas was surety for the Mill and Elevator Company, and that defendant was the accommodation endorser. That on the 21st day of December, 1885, defendant executed two instruments of writing by which he waived presentment for payment, protest, notice of protest, and consented that payment be extended until he should give written notice to the contrary.

The pleadings evolved the issue whether plaintiff, after the maturity of the notes, had, for a valuable consideration, without the knowledge or consent of George Naas, his heirs or administrator, and without the knowledge or consent of the defendant, extended the payment of the notes for a definite time.

Upon the 2d and 4th paragraphs of the declaration, the answers and replies, issues of fact were joined. By consent of the parties, there was a trial by the court, special finding of the facts, conclusions of law upon the findings, and judgment for the defendant.

Upon the 1st and 3d paragraphs of the declaration issues of law were raised by demurrers of defendant, which were sustained.

ARGUMENT.

The assignment of error will be discussed in the same order as presented by plaintiff's brief.

The issues raised by the second and third paragraphs, and the answers thereto, are clear, simple and easy of solution.

The decisive questions are:

First. Did plaintiff endorse the notes as accommodation endorser?

Second. Did George Naas execute the notes as surety for the Mount Vernon Mill and Elevator Company before defendant endorsed the same?

Third. After the maturity of the notes, did plaintiff, for a valuable consideration, extend the payment of the notes for a definite time?

Fourth. Did Naas, his heirs, or administrator know of the extension of time for the payment of the notes, or consent to such extension?

Fifth. Did the defendant know of the extension of time of the payment of the notes or consent to such extension?

The above were the essential matters to be found affirmatively or negatively by the court.

At the close of the evidence the court found each of the above propositions in favor of the defendant. This must have been so, for upon no other hypothesis could the learned judge trying the cause and finding the facts specially, have reached the conclusion stated by him. The language used in stating his conclusion of law upon the facts admits of no other interpretation. It is here inserted:

"Upon the facts specially found in this case, the court has, as matter of law, concludes (concluded) that there was made an agreement for an extension of time and (as) alleged in answer, whereby the heirs and representative of the estate of the surety, Naas, were relieved from liability on the notes in suit, and this having been done without the consent of the defendant, Mackey, he is also released from liability, and is entitled to judgment in his favor upon the issues joined and for his costs."

Having arrived at this conclusion, to argue a different result would be to assert an ignorance upon the part of the learned judge of the plainest principles of the law of sureties, something no one acquainted with his ability as a lawyer, will for a moment suspect, much less assert. He was aware, as is this court, that the agreement to extend the time to a definite period for a valuable consideration must have been either by an express contract or an implied one, the latter to be ascertained by fair inference from all the facts and circumstances of the case. By what mental process he arrived at the result is immaterial. There was abundant evidence to justify him in so doing. Such being the case, it is not believed that this court will inquire whether his findings were right or erroneous, but will pass to the only question properly before it - Is the conclusion of law erroneous? The determination of this might be safely rested with the authorities cited in plaintiff's brief.

The following elementary principle was the basis of the judgment below:

When the payee of a promissory note, for a valuable consideration, extends the payment for a definite time, without the knowledge or consent of the surety, then the surety is relieved from liability on the note, and that the payment of interest is a valuable consideration.

Remingham v. Bedford, 1 Ben Munroe, page 326.

Robertson v. Miller, 2 W. P. D. Bush, page 188.

Menifee v. Clark, 35 Indiana, page 304.

Jarvis v. Hyatt, 43 Indiana, page 163.

Hamilton v. Winteroad, 43 Indiana, page 393.

In the case at bar the Mill and Elevator Company and Naas were principals. Naas, although a principal, was a surety for the company, and as a surety was

primarily liable. Defendant had the right, if compelled, to pay the notes of subrogation to all of plaintiff's rights against the company and Naas. Defendant's right was to pay the notes, with the right of immediate action against Naas and the company. By extending the time of payment, as was done in this case, probably ignorantly, by plaintiff, but just as effectively, as if intelligently done, plaintiff forever relieved Naas' heirs and administrators, and thereby deprived defendent of his undoubted right, both in law and equity, of proceeding against one who stood between him and liability. The moment plaintiff released the surety, *eo instanti*, defendant was released. In this simple form the case presented itself to the court below, and this complexion it has today. Nothing that defendant has executed can be tortured into a shadow of assent that one of his principals might be released, or that the other should have the time of payment extended for a definite period. The court below, with opportunities of weighing the evidence, not afforded this court, so found. The reason for the rule is familiar; the text-books are replete with it, and the unruffled current of decisions are all one way. We do not feel at liberty, therefore, to further prolong this brief on so simple a question of law, and shall at once pass to the first assignment of error.

II.

Did the court below err in sustaining defendant's demurrers to the first and third paragraphs of the declaration?

It is here insisted that the ruling on the demurrers was correct. That if error, it was harmless, and in no

wise prejudiced the substantial rights of the plaintiff, as all the material averments in the first and third paragraphs were provable under the second and fourth. The record discloses that the court heard testimony and had evidence before it pertaining to every allegation contained in each count of the declaration.

The contention raised by the paragraphs demurred to, is the interpretation of the two instruments of writing executed by the defendant on the 20th day of December, 1885. Plaintiff seems to believe that the defendant not only agreed that Naas might be released, and the Mill and Elevator Company could also be discharged from liability, and that he, the defendant, was still to remain bound as paymaster on the notes.

The only reasonable meaning to be given the writings, is that defendant agreed to waive the formality of a protest at maturity of the notes, consented from December 20th, 1885, to be a surety, Naas and the company remaining as principal debtors to him. That he would thenceforward occupy the position of a surety, with all the rights of one, both in equity and law. The stipulation that payment might be extended until he gave written notice to the contrary added nothing, but simply stated what was the law of the transaction the moment defendant elected to abandon his charactor of endorser and become a surety. In other words, defendant in effect said by the instrument: "from and after this date I am a surety on the notes, and agree that passive inactivity or indulgence indefinitely shall not affect my liability, and that to stop this inactivity or indulgence, I must notify you in writing to collect these notes by suit."

It was but putting in another form substantially the

law of the state where it was executed and to be enforced.

"Any person bound as surety upon any contract in writing for the payment of money or the performance of any act, when the right of action has accrued may require by notice in writing the creditor and obligee forthwith to institute an action upon the contract." [Section 1012, Rvised Statutes of Indiana, 1881.]

The view here entertained of these writings is the same as those held by the learned judge who passed upon the demurrers; that by no process of interpretation could they mean that defendant ever contemplated that plaintiff (advisedly or unwittingly) would release Naas, his heirs or legal representatives, from liability on the notes, or that in any event plaintiff would make such a contract as would totally relieve Naas from liability, without affording defendant his recourse at law to collect from his principals. In no way did defendant intimate his consent that the *status* of the parties should ever be changed. He never intended but that Naas' consent to the extension should be first obtained. If there was nothing in the writings which indicated any assent on the part of defendant to an extension of payment for a definite time for a valuable consideration, or that he was willing to remain liable notwithstanding Naas' heirs and administrators were discharged, then the ruling on the demurrers was correct. It is respectfully submitted that there was no error upon the part of the court below, under this assignment, that there is none in the record, and that the judgment should be affirmed.

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